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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 920

THE CHASE MANHATTAN BANK, N.A., as Trustee under the General Income Mortgage of The New York, New Haven and Hartford Railroad Company,

Petitioner,

v.

PENN CENTRAL COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introduction

The Chase Manhattan Bank, N.A., as Indenture Trustee (Chase) under the General Income Mortgage of The New York, New Haven and Hartford Railroad Company (the New Haven), petitions this Court for a writ of certiorari to review before judgment the Chase appeal pending in the United States Court of Appeals for the Second Circuit. That appeal was taken from a final order determining "price issues", as hereinafter defined, of the United States District Court for Connecticut (the Reorganization Court which is in charge of the proceeding for reorganization of the New Haven under Section 77 of the Bankruptcy Act).

Herein we shall first describe the exceptional circumstances which we believe bring the proposed expedited appeal procedure within the permissive scope of Rule 20 of this Court.

Then, with respect to this Court's Rule 23, we shall advert to the fact that, because the questions decided by the Reorganization Court and presented for review by this Court are the same as those decided by a three-Judge District Court in a parallel proceeding, we are contemporaneously filing in this Court a jurisdictional statement pursuant to Rule 15 containing practically the same material as is required under Rule 23 for the present petition. Since repetition of such jurisdictional statement material herein might well be regarded by this Court as unnecessarily burdensome, we shall respectfully ask the Court to consider such jurisdictional statement material as if it were included in this petition.

Discussion Concerning Supreme Court Rule 20

The situation presented by the present petition is unique. As is more fully explained in the jurisdictional statement which is being filed contemporaneously by Chase in this Court, two Courts below have had jurisdiction under two different statutes to review the decision of the Interstate Commerce Commission (the Commission) as to the price to be paid by Penn Central Company (Penn Central) for the assets of the New Haven which were conveyed to Penn Central at the end of 1968.

The three-Judge Court had such jurisdiction pursuant to Section 5(2) of the Interstate Commerce Act because the Commission acted under Section 5(2) in conditioning its authorization of the merger of Penn and Central on the inclusion by Penn Central of the New Haven on fair and equitable terms.

On the other hand, in making findings as to such terms and conditions, the Commission was also acting under Section 77 of the Bankruptcy Act and it therefore certified the same terms and conditions to the Reorganization Court as part of a Section 77 plan for reorganization of the New Haven. In addition, the Commission in the above-mentioned condition of the Penn Central merger (Condition 8—327 I.C.C. at p. 553) provided that terms and conditions for New Haven's inclusion thereafter imposed by the Commission as fair and equitable would be subject to approval by the "Bankruptcy Court". Accordingly, the Reorganization Court had jurisdiction to review such terms and conditions by virtue of the terms of the Section 5(2) inclusion condition as well as by virtue of Section 77.

The dual jurisdiction of the two Courts below has culminated in a stalemate because they have rendered conflicting decisions. The three-Judge Court has by final decree directed Penn Central to pay a price $28,000,000 less than is directed to be paid by the final order entered by the Reorganization Court.* In this situation, both Courts stated that it is only this Court which has the authority to resolve the conflict between the two Courts.

This petition for certiorari seeks review by this Court, before judgment of the Court of Appeals, of the Chase appeal pending in that Court in order that this Court may have before it for review the price decisions of both lower Courts.**

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* On the major price issues on which the two Courts are in conflict, the three-Judge Court has acted by a majority of two Judges, the dissenting Judge agreeing with the Reorganization Court.

** By order dated October 7, 1969, the Court of Appeals for the Second Circuit entered an order consolidating the relevant appeals pending in that Court (including the Chase appeal from the Reorganization Court's final Order Adjudging the Price dated July 28,

As indicated above, the statutory right of appeal directly to this Court from the decree of the three-Judge Court brings before this Court the same questions which are involved in the Reorganization Court price decision from which Chase and other parties have appealed to the Court of Appeals. We think that this Court might well regard it as undesirable for the Court to deal only with one side of this controversy (that which comes directly from the three-Judge Court) while leaving the other side inactive in the Court of Appeals. Until this Court has acted on the direct appeals from the three-Judge Court, the Court of Appeals would inevitably suspend the progress of the appeals in that Court which involve the same questions. In that event, after this Court's decision, further briefs, argument and decision on price issues are likely to be required in the Court of Appeals.

Since the questions hereby presented to this Court are the same as those set forth in our jurisdictional statement,

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1969) into two distinct appeals. One such separate group of appeals included the "issues relating to the sale of the New Haven assets to Penn Central, the valuation thereof, and the price to be paid therefor" and the other included the different "issues relating to that portion of the plan of reorganization which involves the internal reorganization of the New Haven including the rights of creditors *inter se*". This was obviously done to permit a certiorari application to this Court which would relate to the terms and conditions of the sale of New Haven assets to Penn Central (herein sometimes called the "price issues"), leaving the "internal reorganization" issues to be disposed of by the Court of Appeals after this Court has acted in relation to the price issues.

Chase appealed to the Court of Appeals in September, 1968, from the interlocutory order of the Reorganization Court dated August 12, 1968 (A-261a) remanding the Second Supplemental Report to the Commission. This was a "protective" appeal to preserve price issues such as are involved on said Trustee's subsequent appeal to the Court of Appeals from the July 28, 1969 final order as to price issues. That earlier appeal is also included among those consolidated by the aforesaid Court of Appeals order of October 7, 1969.

it would seem to impose no heavier burden on this Court for it to take jurisdiction over both sides of the controversy instead of only one side. If the questions presented in the jurisdictional statement are, as we contend, sufficiently substantial to persuade this Court to note probable jurisdiction, the same questions should, we submit, be sufficiently substantial to call for the granting of this petition for certiorari when considered in the light of the circumstances outlined herein.

This Court has heretofore stressed the importance of accelerating disposition of Section 77 reorganization cases. In *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (1935), the Court said (p. 685) that "Proceedings of this character, involving public and private interests of such magnitude, should, so far as practicable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined".

While there has been considerable delay in the New Haven reorganization proceeding which commenced in July 1961, that delay has been unavoidable. It was largely occasioned by the poor financial condition of the New Haven, by the unanimous initial remand by both Courts of the Commission's first price determination as being grossly inadequate and by the Penn Central merger (on which the New Haven inclusion was dependent) not being effected until litigation opposing that merger was finally disposed of by this Court in January 1968. We believe that the granting of this certiorari petition would be likely to avoid considerable further delay.

This Court's *Rock Island* opinion, *supra*, referred also, as a ground for making expedition desirable, to the magnitude of the public and private interests involved in that Section 77 proceeding. That condition exists here. The

amounts in issue are large and numerous holders of New Haven Mortgage Bonds await the outcome. There are about 3,500 registered holders of the $52,755,500 principal amount of the Bonds secured by the General Income Mortgage under which Chase is Trustee; and there are even a larger principal amount of First and Refunding Mortgage Bonds outstanding.

In view of the extraordinary situation here presented, with two lower Courts in direct conflict, with two Judges below ranged on each side of the conflict, with important legal questions involved which need to be authoritatively decided and which will govern the eventual disposition of large amounts of securities and money claimed on behalf of thousands of Bondholders, we submit that this petition falls within the scope of Rule 20 of this Court and is of such imperative public importance as to justify the deviation from normal appellate processes which is sought hereby.

Discussion Concerning Supreme Court Rule 23

Turning now to the requirements of this Court's Rule 23, such requirements for petitions for certiorari generally parallel those for a jurisdictional statement as provided in Rule 15. Therefore, the contents of the jurisdictional statement being contemporaneously filed by us in respect of the Chase appeal from the three-Judge Court decision involve the same "Introduction", "Opinions Below",* "Questions Presented", "Provisions of Constitution and Statutes Involved", "Statement of the Case" and argument that the "Questions Presented are Substantial" as might

* The opinions of the Reorganization Court and of the three-Judge Court, as well as the Second and Fourth Supplemental Reports of the Commission (the First and Third Supplements do not relate to price issues), are printed in the separate Appendix.

be set forth herein in support of this petition. We shall hereinafter state the "Questions Presented" * as set forth in our jurisdictional statement but, in order to avoid burdening the Court with repetition herein of other material, we shall refer instead to the discussion in our jurisdictional statement under the topics mentioned above and respectfully ask that the Court consider such material in connection with this petition as well as in connection with the jurisdictional statement.

However, there is one topic relating to this petition which is in a different category and therefore requires special mention herein. That topic relates to the jurisdiction of this Court which of course rests on a statute in the case of this petition which is different from that cited in the jurisdictional statement as authorizing a direct appeal to this Court from the three-Judge Court. Accordingly, we shall now furnish information relating to jurisdiction of this Court in respect of this petition and thereafter state the Questions Presented by this petition as well as by our jurisdictional statement.

Jurisdiction

The judgment sought to be reviewed is the final order (A-316a)** concerning price issues made by the United States District Court for the District of Connecticut in the proceeding for reorganization of the New Haven under Sec-

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* The Questions Presented were decided by the three-Judge Court adversely to the contentions of the bondholder interests. However, a number of such questions were decided by the Reorganization Court in favor of our contentions. Those questions which were decided by the Reorganization Court in accordance with our contentions are nevertheless presented for review by this petition since they are merely the reverse side of questions presented for review by the jurisdictional statement.

** Reference herein to ("A- ") is to a page of the separate Appendix.

tion 77 of the Bankruptcy Act. Said order was dated July 28, 1969 and was entered on the same date.

Chase appealed to the Court of Appeals for the Second Circuit from said order's determination of price issues by filing on August 26, 1969 a notice of appeal of the same date in the United States District Court for the District of Connecticut. Said appeal has been docketed in said Court of Appeals. The appeal to that Court from said order remains undecided, the case having neither been briefed nor argued.

The jurisdiction of this Court to review the case in said Court of Appeals before rendition of judgment by the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether after the Commission, pursuant to Section 5(2) of the Interstate Commerce Act, had approved the application of Penn and Central to merge on condition that the merged company acquire the railroad operations and assets of the New Haven on fair and equitable terms as determined by the Commission and the Reorganization Court, the New Haven was entitled to receive as compensation from Penn Central the liquidation value of the assets transferred to Penn Central, which the New Haven could have realized on such assets if they had been condemned or if the New Haven had been liquidated?

2. Whether, in the case of a deficit railroad such as the New Haven, the Commission could legally reject net liquidation value as the valuation standard and arbitrarily announce as fair and equitable a value and price for such assets without having followed any legal standard of valuation?

3. Whether the unanimous conclusion of the three-Judge Court in its July 1968 decision, concurred in by the Reorganization Court in its August 1968 decision, (a) that the price payable by Penn Central could not be less than liquidation value and (b) that § 1(18) of the Interstate Commerce Act calling for the Commission's consent to an abandonment could not stand in the way of a liquidation valuation as of December 31, 1966 because of the New Haven's constitutional right on the facts shown by the record to cease its railroad operations, was the law of the case which should not have been departed from in the Commission's Fourth Supplemental Report or in the opinion of two Judges of the three-Judge Court filed June 18, 1969?

4. Whether, after the New Haven had been operated for over seven years in proceedings under Section 77 of the Bankruptcy Act with large and increasing operating losses and without any prospect of decreasing such losses or operating as a profitable railroad, the New Haven and its creditors would have the right to discontinue the losing railroad operations and realize the liquidation value of the New Haven assets pursuant to the Fifth Amendment of the Constitution of the United States prohibiting the taking of private property for public use without just compensation and prohibiting deprivation of property without due process of law?

5. Whether Penn Central's present inability to realize by sale the net liquidation value of the New Haven assets sold to it because it is in the public interest that Penn Central continue the deficit New Haven operations, which Penn Central had agreed to do as a condition of effecting the merger of Penn and Central, was a legal basis for the Commission's prescribing a price payable by Penn Cen-

tral to the New Haven substantially below the net liquidation value which the New Haven could have realized for such assets?

6. Whether, after the three-Judge Court and the Reorganization Court in the summer of 1968 determined (a) that the Commission's finding that about $125,000,000 of net proceeds would be realized in a liquidation by the New Haven of the assets here involved over a six-year liquidation period was erroneous because it was far below net liquidation value and (b) that net liquidation value was the minimum to which the New Haven was entitled, and after that Court had therefore remanded the proceeding to the Commission for a substantial increase of its rejected finding of liquidation value, the Commission acted arbitrarily, capriciously and without substantial support in the record by increasing its liquidation value finding only to $162,700,000 and by then reducing that liquidation value finding by conjuring up (i) an additional year's delay of the six-year liquidation period which would allegedly reduce the new finding of net liquidation value by $15,400,000 and (ii) a new so-called bulk sale discount of $6,700,000 which would further reduce such net liquidation value?

7. Whether, after the three-Judge Court in its July 1968 decision determined that the Commission's $125,000,000 finding of the liquidation value of the New Haven assets, based on a six-year liquidation period, might well be inadequate in the range of $45,000,000 to $50,000,000 (the Reorganization Court in its August 1968 decision finding the range of deficiency to be between $33,000,000 and $55,000,000) and after both Courts remanded the respective proceedings to the Commission for further action in accordance with the opinions of the two Courts, which

opinions in no way questioned the six-year liquidation period, the Commission lacked power largely to increase its finding of liquidation expenses by stretching out the liquidation period by an additional year and by adding a large new item of expense for the purpose of decreasing its new net liquidation value finding of $162,700,000 by $22,000,000?

8. Whether the price of approximately $141,600,000 payable by Penn Central for the New Haven assets prescribed by the Commission in its Fourth Supplemental Report as modified and approved by the majority of the three-Judge Court, which price was far less than the net liquidation value of such assets, was without substantial support in the record and was arbitrary and capricious?

9. Whether, after concluding that the New Haven had a 50% interest in those net earnings of the Grand Central Terminal hotels and office buildings which were in excess of the amount thereof used to defray Terminal expenses, the Commission acted arbitrarily and capriciously and without substantial support in the record in ruling that the New Haven's interest (about $5,600,000 annually) in those hotel and office building net earnings which had been used to defray Terminal expenses payable by the New Haven was to be transferred by the New Haven to Penn Central free and clear of any restriction without the New Haven's receiving any compensation therefor, although potentially worth some $70,000,000?

10. Whether the Commission erred in arbitrarily limiting to $5,000,000 the amount which Penn Central should bear of the more than $10,000,000 of losses of the New Haven incurred by reason of the deferment for Penn Central's convenience and benefit of New Haven's inclu-